Supreme Court, U.S.
FILED
OCT - 8 1993
OFFICE OF THE CLERK

No. 93-385

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

GENERAL MILLS, INC., BETHLEHEM STEEL CORPORATION, NABISCO BRANDS, INC., and UNION CARBIDE CORPORATION,

Petitioners,

—against—

THE POWER AUTHORITY OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ARTHUR T. CAMBOURIS*
SARAH J. BERGER

CHARLES M. PRATT
Power Authority of the State
of New York
1633 Broadway
New York, New York 10019

Attorneys for Respondent Power Authority of the State of New York

**Counsel of Record*

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Court of Appeals properly affirmed the District Court's determination that the Niagara Redevelopment Act does not mandate a Replacement Power rate set at cost.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 2

REASONS FOR DENYING THE WRIT 3

I. THE PETITION SHOULD BE DENIED BECAUSE IT DOES NOT PRESENT A CONFLICT OVER THE CONSTRUCTION OR APPLICATION OF ANY PRINCIPLE OF LAW 3

II. THE PETITION SHOULD BE DENIED BECAUSE THE SECOND CIRCUIT'S ANALYSIS OF THE NRA'S LANGUAGE AND LEGISLATIVE HISTORY WAS CORRECT 4

CONCLUSION 8

TABLE OF AUTHORITIES

CASES

Occidental Chem. Corp. v. Power Authority,
990 F.2d 726 (2d Cir. 1993) 5, 6

Occidental Chem. Corp. v. Power Authority,
786 F. Supp. 316 (W.D.N.Y. 1992) 4, 5, 6

STATUTES

Falcon Dam on the Rio Grande Act of 1945,
ch. 310, 68 Stat. 255 (1954) 5

Flood Control Act of 1944,
16 U.S.C. § 825s (1988) 5

Niagara Redevelopment Act,
16 U.S.C. § 836 (b)(3) (1985) ..... *passim*

N.Y. Civ. Prac. L. & R. § 7801 *et seq.*
(McKinney 1981 & Supp. 1993) 6

OTHER AUTHORITIES

H.R. Rep. No. 862, 85th Cong., 1st Sess. (1957) 6

S. Rep. No. 539, 85th Cong., 1st Sess. (1957) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NO. 93-385

GENERAL MILLS, INC., BETHLEHEM STEEL CORPORATION, NABISCO BRANDS, INC., and UNION CARBIDE CORPORATION,

Petitioners,

against

THE POWER AUTHORITY OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

This case concerns the rate charged for a category of hydropower sold to industry from the New York Power Authority's Niagara Power Project known as "Replacement Power." Even after the recent increases of which petitioners complain, this power is sold at a rate which makes it among the cheapest electricity available to industries in the nation. Nonetheless, petitioners insist that the rates must be even lower. That claim is based exclusively on their strained interpretation of a phrase found in a federal statute, the Niagara Redevelopment Act ("NRA"). 16 U.S.C. § 836 (b)(3) (1985).

According to petitioners, that phrase guarantees them a rate which must be set at the cost of generating power at the Niagara Power Project. Petitioners proffered this interpretation of the phrase to the District Court and the Court of Appeals for the Second Circuit. In a forty-page opinion, the District Court carefully considered each of petitioners' arguments and rejected them. The Court of Appeals unanimously affirmed the judgment and denied rehearing. In both courts, petitioners' case was consolidated with that of two other plaintiffs. Those plaintiffs have not petitioned for writ of certiorari nor joined in this petition.[1]

In seeking certiorari, petitioners rely primarily on their disagreement with the lower courts' statutory construction. Both courts fully analyzed and rejected

---

[1]On September 30, 1993, one of those two plaintiffs provided the Court with a perfunctory letter noting that it "supports the request" that a writ of certiorari be issued. No reasons or arguments for granting the request were included.

petitioners' interpretation of the NRA. The decisions below are amply supported by the record and correctly decided on the law. Petitioners offer no compelling reason why this Court should grant certiorari, as required by Supreme Court Rule 10. Therefore, the petition should be denied.

REASONS FOR DENYING THE WRIT

I. THE PETITION SHOULD BE DENIED BECAUSE IT DOES NOT PRESENT A CONFLICT OVER THE CONSTRUCTION OR APPLICATION OF ANY PRINCIPLE OF LAW.

Petitioners have not demonstrated any special or important reason for the exercise of this Court's discretion. No constitutional questions have been raised. The decision below does not conflict with either the decisions of this Court or the decisions of other circuit courts. Petitioners have also failed to show the presence of an issue of national importance. At issue is the interpretation of one phrase of a unique federal statute with very specific application. To our knowledge, the phrase at issue is not repeated in any other federal statute. As petitioners acknowledge, Replacement Power is a "unique category of electricity" sold to a "specific group of [industrial] customers." Petition for Writ of Certiorari ("Pet.") at 4.

II. THE PETITION SHOULD BE DENIED BECAUSE THE SECOND CIRCUIT'S ANALYSIS OF THE NRA'S LANGUAGE AND LEGISLATIVE HISTORY WAS CORRECT.

Petitioners' main argument in seeking a writ appears to be that the decision below was incorrect. In making this argument, petitioners merely rehash arguments raised and properly rejected by both lower courts. What they do not do is offer any substantial reason why this case warrants further review by this Court.

All parties agree that the issue here is one of statutory interpretation, and agree on which provision of the NRA is at issue. The NRA provides that Replacement Power is to be sold to Niagara area industries which had previously purchased power from Project 16, "in order as nearly as possible to restore low power costs to such industries." Petitioners find no fault with the lower courts' approach to statutory construction, conceding that the "ordinary meaning" of the statute controls its interpretation. Pet. at 13. Instead, they insist that the court erred when it rejected petitioners' unsupported "reading" of these words.

In their briefs to the courts below, petitioners argued that the NRA required a cost-based rate. This argument was soundly rejected, with both courts describing petitioners' interpretation as "quite contrived." *Occidental Chem. Corp. v. Power Authority*, 786 F. Supp. 316, 325 (W.D.N.Y. 1992) (Pet. App. 11a-48a, 31a);[2]

---

[2]References preceded by "Pet. App." are to the pages of the Appendices to the Petition.

Occidental Chem. Corp. v. Power Authority, 990 F.2d 726, 727 (2d Cir. 1993) (Pet. App. 3a-10a, 7a). Petitioners' interpretation of the NRA has become even more convoluted in its current form. Petitioners now argue that the NRA requires a cost-based rate *or* a rate set at 3 mills, whichever is higher. Pet. at 21.

However phrased, the particularized rate standard petitioners read into the NRA is unsupported by its text and legislative history. The words of the NRA's Replacement Power provision are expressive of general objectives, and not limitations or prohibitions. The provision makes no mention of rates or rate formulas. Nor is there a discussion of any prior rate at which Niagara Mohawk sold Project 16 power.[3] In marked contrast to other federal statutes, the NRA does not once refer to the cost of producing power, let alone enumerate the specific items that could be considered part of the Authority's costs.[4]

Indeed, the sole statutory reference to cost is to the power costs borne by the industries. In other words, Congress' focus was on the *customers*' costs, not on the

---

[3]The 445,000 kW generated by Project 16 was never sold at one uniform rate. Niagara Mohawk sold 273,000 kW of Project 16 power at the 3-mill rate, with the remaining 172,000 kW sold at a higher rate. *Occidental*, 786 F. Supp. at 320, 324 n.9 (Pet. App. 18a, 26a). And as the District Court pointed out, even the 3-mill rate was not set at cost. *Occidental*, 786 F. Supp. at 327 (Pet. App. 34a).

[4]In other hydroelectric power statutes, Congress expressly referred to rates, linked those rates to cost of production, and designated the specific costs which were to be recovered in the rates. *See* Falcon Dam on the Rio Grande Act of 1954, ch. 310, 68 Stat. 255 (1954); Flood Control Act of 1944, 16 U.S.C. § 825s (1988); *see also Occidental*, 786 F. Supp. at 326, 330 (Pet. App. 32a, 42a).

seller's cost of generation. Thus, the district court correctly concluded: "The phrase 'low power costs' means what it says: low-cost power. It does not mean 'at-cost' power." *Occidental*, 786 F. Supp. at 327 (Pet. App. 36a).

The legislative history echoes the language of the NRA, and demonstrates congressional concern for restoring a source of "low-cost power" to industry. H.R. Rep. No. 862, 85th Cong., 1st Sess. 8 (1957); S. Rep. No. 539, 85th Cong. 1st Sess. 8 (1957). Throughout this litigation, petitioners were unable to point to a single statement by any member of Congress which refers to a particular Replacement Power rate, let alone the specific cost-based rate standard they suggest.

Finally, petitioners claim that the court's interpretation of the NRA provides the Authority with "unfettered discretion," and that Congress could not have intended such a result. Pet. at i, 12. While this argument "begs the question of what Congress intended," *Occidental*, 786 F. Supp. at 332 (Pet. App. 47a), in fact, the statutory goal is the restoration of "low-cost power." Petitioners do not and cannot claim that this guideline has been violated. As the Court of Appeals noted, in quoting the District Court's opinion, "'Replacement Power is still apparently the cheapest firm industrial power in the United States, and by a wide margin.'" *Occidental*, 920 F.2d at 728 (Pet. App. 9a), quoting *Occidental*, 786 F. Supp. at 330 (Pet. App. 42a-43a). Moreover, should petitioners in the future claim that the Authority has abused its discretion in setting Replacement Power rates, its rate-setting actions are subject to review by New York state courts. N.Y. Civ. Prac. L. & R. § 7801 *et seq.* (McKinney 1981 & Supp. 1993).

It is petitioners, not the courts, who have "ignored the statutory language" of the NRA. Pet. at 21. While petitioners are clearly dissatisfied with the conclusion reached by the lower courts, their argument is a thinly disguised request for redrafting of the NRA. Both courts properly declined the request, finding that the NRA, as written by Congress, does not mandate a Replacement Power rate set at cost.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

DATED: New York, New York
October 8, 1993

Respectfully submitted,

Arthur T. Cambouris*
Sarah J. Berger

Charles M. Pratt
Power Authority of the
State of New York
1633 Broadway
New York, NY 10019
(212) 468-6151

Attorneys for Respondent
Power Authority of the
State of New York

Counsel of Record